Supreme Court, U. S.
FILED
AUG 25 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 78-142

LINDA J. BOTKIN, ET AL.,
Petitioners,

versus

DELTA AIR LINES, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GORDON DEAN BOOTH, JR.
500 Candler Building
Atlanta, Georgia 30303
Attorney for Respondent

OF COUNSEL:
Sidney F. Davis
Law Department
Delta Air Lines, Inc.
Hartsfield Atlanta
International Airport
Atlanta, Georgia 30320

J. Stanley Hawkins
Seward & Kissel
500 Candler Building
Atlanta, Georgia 30303

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53098, N. O., LA. 70153 - 504/822-1611

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED FOR REVIEW 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR DECLINING TO ISSUE THE WRIT 5

I. The Legal Issues Surrounding The Pre-1972 Nonaccrual Policy Are Based On Peculiar Facts Not Likely To Recur 5

II. Petitioners Suffered No Loss Of Seniority 6

III. Petitioners' "Disparate Impact" Argument Based On Section 703(a)(2) Is Misplaced 7

IV. The *Stroud* Principle Upon Which The Court Of Appeals Relied Is Consonant With Prior Opinions Of This Court 8

V. Petitioners' Arguments Concerning "Pretext" Are Belatedly Raised And Are Devoid Of Factual Support 9

CONCLUSION 9

CERTIFICATE OF SERVICE 10

TABLE OF CITATIONS

Cases: Page

Furnco Construction Co. v. Waters, ___ U.S. ___, 46 U.S.L.W. 4966 (June 29, 1978) 9

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 7

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 7

Harriss v. Pan American World Airways, 441 F. Supp. 881 (N.D. Cal. 1977) 6

McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973) 8

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) 6

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) 8

Stroud v. Delta Air Lines, Inc., 544 F.2d 892 (5th Cir. 1977), *rehearing denied*, 548 F.2d 356, *cert. denied*, 434 U.S. 884 (1977) 5,8

Statutes:

42 U.S.C. §2000e-2(a)(1) 2,3

42 U.S.C. §2000e-2(a)(2) 2,3

42 U.S.C. §2000e-12(b) 2,3

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-142

LINDA J. BOTKIN, ET AL.,
Petitioners,

versus

DELTA AIR LINES, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, DELTA AIR LINES, INC., (hereinafter referred to as "Delta"), opposes the Petition for a Writ of Certiorari to the Fifth Circuit Court of Appeals on the grounds set forth herein.

OPINIONS BELOW

Delta acknowledges that the Petitioners have appended the pertinent portions of the opinions by the lower courts to their petition. All cites in this brief to matters contained in lower court opinions will be to the Petitioners' Appendix.

JURISDICTION

Delta agrees with Petitioners' statement with regard to the jurisdiction of this Court.

QUESTION PRESENTED FOR REVIEW

Delta respectfully disagrees with the Petitioners' statement of the questions presented for review. Delta respectfully submits that the only question properly submitted by the petition is:

Whether Petitioners may challenge, as violative of Section 703(a)(1) or 703(a)(2) of the Civil Rights Act of 1964, Delta's pre-1972 policy for flight attendants of limiting seniority accrual to the first ninety (90) days of maternity leaves of absence when, during that period, there were no similarly situated males who could have received favored treatment.

STATUTORY PROVISIONS INVOLVED

In addition to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, cited by Petitioners, the following provision of that Act is also relevant:

Section 713(b), 42 U.S.C. §2000e-12(b) provides in pertinent part:

> ". . . (b) in any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment on account of (1) the commission

> by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on *any* written interpretation or opinion of the commission . . . ." (Emphasis added).

STATEMENT OF THE CASE

Delta feels that the posture of this case has not been clearly or adequately presented by Petitioners and therefore respectfully offers the following counter statement of the case.

This is an employment discrimination suit brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq*. The Petitioners are ten (10) female flight attendants currently employed by Delta, each of whom has, at one point in her employment with Delta, taken a maternity leave of absence and subsequently returned to work. These maternity leaves ranged from less than six (6) months to more than ten (10) months duration.

There are three types of seniority at Delta which are relevant to the flight attendant position. Company or employment seniority governs benefits accrual such as retirement, sick leave and vacation eligibility. Pay seniority governs base salary levels within the particular job classification which are geared to length of service. Bid seniority for flight attendants[1] deter-

---

1 Bid seniority exists at Delta only within the flight attendant and pilot job classifications. Bid seniority for flight attendants has no relevance to pilots. Likewise, bid seniority for pilots has no relevance to flight attendants.

mines which flight attendants are assigned to which "trips" or group of flights at a particular flight attendant base. Under Delta's pre-1972 policy, the Petitioners continued to accrue employment seniority during the entirety of their maternity leaves but accrued pay and bid seniority for the first ninety (90) days only. Petitioners retained all seniority accrued prior to their leaves. Petitioners maintain that Delta's refusal to grant them pay and bid seniority for the entire length of their maternity leaves constituted unlawful discrimination on the basis of sex within the meaning of Title VII.

During the relevant time period when Petitioners took their maternity leaves, Delta's flight attendants consisted of an *entirely female* staff. There were no males involved in the functioning of the policy. No male flight attendant at Delta has ever been higher on the pay or bidding seniority lists than any of Petitioners.

In November of 1972, after the time that all of the Petitioners took their maternity leaves, Delta changed its policy so as to grant accrual of pay and bid seniority to flight attendants during the entirety of maternity leaves.

While Petitioners attempt to make much of other aspects of Delta's maternity leave policy for flight attendants, the seniority issue was the only aspect of that policy litigated in this case. The commencement and return dates of maternity leaves and the nonpayment of sick leave and disability benefits for absences associated with pregnancy were not challenged in the courts below.

After a full trial on the merits the District Court ruled that, even though Delta had pleaded and proved that its prior policy had been maintained in conformity with prior written interpretations or opinions of the EEOC, Plaintiffs were entitled to back seniority, back pay and attorneys fees. Petition for Writ, Appendix E. On appeal, the Fifth Circuit Court of Appeals reversed, reaffirming its holding in *Stroud v. Delta Air Lines, Inc.*, 544 F.2d 892, *rehearing denied*, 548 F.2d 356, *cert. denied*, 434 U.S. 884 (1977), that there must be a showing of some dissimilarity of treatment between males and females in order to prove a *prima facie* violation of Title VII. Petition for Writ, Appendix B.

REASONS FOR DECLINING TO ISSUE THE WRIT

I. The Legal Issues Surrounding The Pre-1972 Nonaccrual Policy Are Based On Peculiar Facts Not Likely To Recur

It is undisputed that Delta's pre-1972 policy of nonaccrual of seniority for pay and bidding purposes for certain extended periods of flight attendant maternity leaves has long since been changed. In the days when this rule was in effect at Delta, virtually all flight attendant jobs throughout the airline industry were held by females. That is simply no longer the case at Delta or in the industry generally, and there is no indication that that situation will recur or that Delta contemplates a return to its prior policies. Any controversy arising out of policies in existence at a time when women held all of the flight attendant jobs is of such minor current importance in the overall structure of Title VII law that its resolution by this Court is unnecessary.

II. Petitioners Suffered No Loss Of Seniority

In an effort to demonstrate some conflict between the ruling of the Fifth Circuit below and this Court's opinion in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), Petitioners claim to have suffered a loss of seniority as a result of the operation of the pre-1972 policy. Petition for Writ, p. 6. Petitioners' claim misconceives both the nature of seniority at Delta and this Court's holding in *Satty*.

In *Satty* female employees returning to work following maternity leave successfully maintained that their employer's policy of taking away job seniority which they had earned prior to the time their maternity leaves began constituted unlawful sex discrimination in violation of Title VII. 434 U.S. 136. Here, on the other hand, no previously earned seniority was taken away. Petitioners suffered no loss, or burden, because of being on leave of absence. Delta simply declined to grant them seniority for more than a portion of an extended period of time during which they did not work. Nothing in *Satty* indicates that it is sex discriminatory to allow some women who are actually performing job duties to accrue pay and bid seniority during a time when other women, who are not working, do not accrue it.[2] As the court said in *Harriss v. Pan American World Airways, Inc.*, 441 F. Supp. 881, 883 (N.D. Cal. 1977), in response to similar arguments regarding the effect of *Satty* on nonaccrual of seniority during maternity leave:

2 *Satty* did not involve the issue of nonaccrual of seniority during maternity leave. *See Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977).

> In the common understanding of the industrial world, seniority is earned for work done. Denying seniority for time during which an employee is not working cannot be regarded as the imposition of a burden. It is more akin to the denial of a benefit which, under the *Gilbert* [*General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)] analysis as applied to the facts of this case, does not run afoul of Title VII. *Gilbert* "did not require that greater economic benefits be paid to one sex or the other 'because of their different roles in the scheme of existence' " ___ U.S. ___, 98 S.Ct. 351, 54 L.Ed.2d 356.

Petitioners have suffered no *burden* at all. Their complaint with the pre-1972 policy flows from the fact that only a limited seniority *benefit* was granted to them during their maternity leaves.

III. Petitioners' "Disparate Impact" Argument Based On Section 703(a)(2) Is Misplaced

Petitioners' attempt to place reliance on disparate impact analysis (Petition for Writ, p. 7) shows a fundamental misconception of the principles set forth in this Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Griggs* involved the use of standardized intelligence tests which operated to exclude black job applicants from employment opportunities at substantially higher rates than white job applicants. 401 U.S. at 426. The essential cornerstone in the application in *Griggs* of "disparate impact"

analysis was the clear disparity in the relative pass rates between black job applicants and white job applicants. The fact that blacks failed the tests at the rate of 94% would have been meaningless unless the white failure rate of 42% was there for comparison. 401 U.S. at 430, n.6. Here there are simply no males to compare and Petitioners' argument of "disparate" impact amounts to a non sequitur. The pay and bid seniority of flight attendants is simply irrelevant to any Delta employees but flight attendants. No male was ever elevated over any of Petitioners in either type of seniority because of the policy at issue in this case.

IV. The *Stroud* Principle Upon Which The Court Of Appeals Relied Is Consonant With Prior Opinions Of This Court

The rule of *Stroud v. Delta Air Lines, Inc.*, 544 F.2d 892 (5th Cir. 1977), *rehearing denied*, 548 F.2d 356, *cert. denied*, 434 U.S. 884 (1977), upon which the Court of Appeals relied, stands for the proposition that unlawful discrimination under Title VII cannot exist in the abstract. In order to prevail in a sex discrimination case such as this one, a plaintiff must show that she has been treated in a disparate way vis-a-vis similarly situated males. This was the essence of this Court's opinion in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). Unlawful discrimination can only be found where there is something to compare. *Cf. McDonnel Douglas Corp. v. Green*, 411 U.S. 792 (1973). Any other rule would require the federal courts to engage in speculation and the imposition of a court's business judgment for that of the employer. Congress intended no such interference with the business judgment of

employers when it enacted Title VII. *Furnco Construction Co. v. Waters*, ___ U.S. ___, 46 U.S.L.W. 4966 (June 29, 1978).

V. Petitioners' Arguments Concerning "Pretext" Are Belatedly Raised And Are Devoid Of Factual Support

Petitioners next argue that the Court of Appeals holding in this case would preclude proof of pretextual motivation underlying employment policies such as the pre-1972 seniority policy at issue here. Petition for Writ, p. 9. This argument, however, was not before the Court of Appeals because Petitioners had never raised it. At no time in the trial court did Petitioners argue that Delta's prior policy was a pretext for sex discrimination and no evidence was presented which could justify such a finding. It is entirely too late for Petitioners to argue pretext at this stage of the litigation.

CONCLUSION

For all of the above reasons, it is respectfully submitted that the Petition for a Writ of Certiorari to review the judgment and opinion of the Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

Gordon Dean Booth, Jr.
Attorney for Respondent
500 Candler Building
Atlanta, Georgia 30303

OF COUNSEL:

Sidney F. Davis
Law Department
Delta Air Lines, Inc.
Hartsfield Atlanta
International Airport
Atlanta, Georgia 30320

J. Stanley Hawkins
Seward & Kissel
500 Candler Building
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three true and correct copies of the above and foregoing have been served on Petitioners by depositing the same in the United States Mail, postage prepaid, and properly addressed to John Walton Henderson, Jr., 1916 Piedmont Road, N.E., Atlanta, Georgia 30324, this the ____ day of August, 1978.

_____

Gordon Dean Booth, Jr.
Attorney for Respondent